APPEAL NO. 93457

At a contested case hearing held on May 17, 1993, in (city), Texas, the hearing officer, (hearing officer), considered the sole disputed issue unresolved from the benefit review conference (BRC), namely, whether respondent (carrier) was entitled to reduce temporary income benefits (TIBS) on account of appellant's (claimant) termination while he was on a light duty status. The hearing officer stated at the hearing and in her decision that the disputed issue as framed at the BRC necessarily involved questions of disability and bona fide offer of employment under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act) and indeed such statement was not challenged below or on appeal. Concluding that (employer) made claimant a bona fide offer of employment on January 13, 1993, at 85% of his preinjury wage, and that claimant continued to have disability, the hearing officer ordered the carrier to reduce claimant's TIBS to the greater of the minimum weekly benefits or 70% of 15% of claimant's preinjury average weekly wage (AWW). Claimant's appeal may be interpreted as challenging the conclusion that employer's offer was indeed a bona fide offer given claimant's complaints about the employer's representative who communicated the offer. The carrier's response urges the sufficiency of the evidence to support the decision.

DECISION

Finding the evidence sufficient to support the decision, we affirm.

Claimant's first written communication with the Texas Workers' Compensation Commission (Commission) Appeals Panel was timely as a request for review. However, his two subsequent communications were not timely and will not be considered. *See* Article 8308-6.41(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3).

Claimant had been employed as a city driver for employer for approximately 15 years when he was injured by a fellow employee on (date of injury). The compensability of the injury was not disputed and it occurred when claimant was grabbed around the neck by (Mr. I), a coworker. Claimant had returned to employer's terminal, exited the truck, and was walking across the dock area when he noticed a forklift with its engine idling. Claimant said that leaving the forklift idling was a violation of employer's policy so he went over to the forklift to shut off the engine. As he did so, coworker Mr. I told him not to shut it off but claimant did so anyway, whereupon Mr. I grabbed him around the neck. A nearby coworker and apparent supervisor, (Mr. P), intervened and the altercation ended. Incidentally, claimant contended and indeed spent a great deal of his testimony contending that the assault by Mr. I had either been arranged for or was condoned by employer's management because of claimant's complaints of unsafe working conditions, such as exposure to carbon monoxide, and his calling of attention to U.S. Department of Transportation regulatory violations.

Claimant said that after he completed his shift on October 9th, he went to an emergency room, was given some medication, and was later seen for his neck injury by his family doctor who did not give him any work restrictions. Still later he said was seen by (Dr.

F) who, according to claimant, did restrict his work activity from bending or stooping. He said he also saw Dr. K for a second opinion and was restricted from driving.

It appears from the documentary evidence that employer made an effort in November 1992 to get claimant back to light duty work. Claimant introduced a letter from employer's Injury Counselor, dated November 16, 1992, stating that claimant's doctor had released him for work in a transitional job, and that employer had a transitional job for claimant entitled "terminal assistant" which employer had matched to claimant's physical abilities while he recovers from his injury. The letter directed claimant to report for the job on November 18th but the record was not developed respecting whether claimant did return to work at that time and for what period. Attached to employer's job offer letter was an employer's form entitled Physical Evaluation For Transitional Work, apparently filled out by the (Clinic), which showed that claimant was initially seen at the Clinic on October 13, 1992, was diagnosed with cervical sprain/strain, cervical radiculopathy, and myofascitis, and was taken off work on November 10, 1992. Claimant made some reference in his testimony to having previously worked at light duty.

Claimant had a meeting on January 12, 1993, with (Mr. S), employer's freight manager, at which meeting Mr. S offered claimant the terminal assistant position. Claimant tape recorded his conversation with Mr. S at that meeting and the tape recording was in evidence. At that meeting, claimant told Mr. S he felt the position being offered was just a "make work" job and said he wanted the details of the job in writing. Mr. S agreed to produce written details of the position for claimant the following day. However, claimant stated that his reviewing the details of the job the next morning did not mean he would be accepting the offer.

On the morning of January 13th at the workplace, Mr. S presented claimant with employer's written job offer for the terminal assistant position and asked him to clock in which claimant did. Attached to the offer was a job description which included answering telephones, using the radio, performing writing and paperwork, checking the yard, security guard duties, and retrieving information from the CRT. The description stated that other duties may be assigned consistent with limitations set by the attending physician. The Physical Evaluation For Transitional Work, signed by Dr. F on January 11th and attached to employer's January 12th written job offer, contained certain restrictions which were to last for five to eight weeks including no bending or stooping, clerical duties only, and certain hourly limitations on walking, standing, and sitting. Claimant testified that he went in on January 13th to take the job, that he was offered the terminal assistant position, that he looked over the duties in the job description and did not object to them, that he understood they did not include driving duties, and that he did not know whether he could perform them. Mr. S testified that they had on a previous occasion discussed the number of hours to be worked at the light duty job and agreed that if claimant should experience discomfort doing

one of the tasks, he should switch to a different task. When asked whether he intended to work that day or not, claimant responded that he wasn't sure what was going to happen.

Mr. S told claimant that he was clocked in, that he, Mr. S, had been advised by employer's legal counsel not to permit claimant to tape record their conversation, and asked him to turn off the tape recorder and remove it from the premises. Mr. S said that the tape recorder was not necessary for the performance of claimant's duties. Claimant refused to do so and they discussed the matter at some length with Mr. S continuing to insist that claimant turn off the recorder and claimant refusing to do so. Finally, Mr. S told claimant he interpreted claimant's refusal to turn off the tape recorder as a refusal to work the transitional job offered and claimant's employment was terminated. Mr. S testified that claimant was discharged for refusing to work under the conditions of the transition program which did not include the use of a tape recorder, that there was no requirement for a tape recorder to perform the duties of the job offered, and that claimant was not offered the job with the hope he would not take it so that employer could fire him. It was apparent from the position of the parties that the carrier regarded employer as having made a bona fide offer of employment on January 13th, regarded claimant as having refused to accept the offer and being terminated in the process, and that therefore the carrier was entitled to reduce claimant's TIBS because of the wages the job offered would have paid. There was documentary evidence that claimant may have been once again offered the same job by letter of March 5, 1993, and claimant introduced a letter to a person, not identified, which stated that on March 8th he had been reinstated in the modified work program but that the position was eliminated on March 10th because of his health resulting from his injury. The evidence was not further developed on this matter nor did the parties seem to relate any March 1993 job offer as such to the disputed issue.

Below follow the pertinent factual findings, legal conclusions, and the relevant portion of the Decision and Order:

FINDINGS OF FACT

4.On January 13, 1993, [employer] offered Claimant a clerical job which Claimant was physically capable of performing and which was geographically accessible to Claimant.

5.The position which [employer] offered Claimant on January 13, 1993, would have paid Claimant eighty-five percent of Claimant's preinjury wage.

6.Due to the continuing effects of Claimant's injury of (date of injury), Claimant continues to be unable to obtain and retain employment at wages equivalent to the wage Claimant earned prior to (date of injury).

7.The position [employer] offered Claimant on January 13, 1993, was a bona fide offer of employment.

CONCLUSIONS OF LAW

4.On January 13, 1993, Claimant's employer extended him a bona fide offer of employment.

5.Claimant continues to have disability.

DECISION AND ORDER

Although Claimant continues to have disability, Claimant's former employer extended him a bona fide offer of employment for eighty-five percent of his preinjury wage on January 13, 1993. Carrier is ORDERED to reduce Claimant's [TIBS] to the greater of the minimum weekly [TIBS] or seventy percent of fifteen percent of Claimant's preinjury average weekly wage.

An employee who has a compensable injury, who has disability, and who has not achieved maximum medical improvement, is entitled to TIBS. *See* Articles 8308-1.03 (10), (16), (32), 8308-3.01, 8308-4.21, 8308-4.22, and 8308-4.23. Article 8308-4.23(c) provides that TIBS are payable at the rate of 70% of the difference between the employee's average weekly wage (AWW) and the employee's earnings after the injury, not to exceed the maximum weekly benefit (Article 8308-4.11) nor be less than the minimum weekly benefit (Article 8308-4.12). Article 8308-4.23(f) provides as follows: "For purposes of Subsections (c) and (d) of this section, if the employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equivalent to the weekly wage for the position offered to the employee." Rule 129.5 provides that the Commission, in determining whether an offer of employment is bona fide, shall consider the expected duration of the offered position, the length of time the offer was kept open, the manner in which the offer was communicated, the physical requirements and accommodations of the position compared to the employee's physical capabilities, and the distance of the position from the employee's residence.

Rule 129.5(b) provides that a written offer of employment delivered to the employee shall be presumed to be a bona fide offer if it states clearly the position offered, the duties, the wage, the location of the employment, and the employer's awareness of the employee's physical limitations and a willingness to abide by same. Rule 129.5(b) goes on to provide that if the offer is not made in writing, the carrier is required to provide "clear and convincing" evidence that a bona fide offer was made. The hearing officer in her discussion stated that since employer's written job offer did not state the maximum physical requirements of the

offered position, it was not presumed to be a bona fide offer. However, the hearing officer further stated that carrier had shown by clear and convincing evidence that employer had extended a bona fide offer of employment to claimant. The hearing officer went on to comment: "[Claimant] declined to accept [the offer] by his refusal to accommodate his employer's repeated requests that he not tape record their conversation. It is extremely clear that the offered employment was not a ruse to enable Carrier to reduce Claimant's [TIBS], since the audiotape, Carrier's Exhibit 9, affirmatively demonstrates that [Mr. S] offered Claimant a position doing clerical work, and that [Mr. S] acted in an extremely tolerant manner in response to being confronted with Claimant's tape recorder on January 13, 1993." While the evidence was not developed regarding the distance of the job from claimant's residence, it was clear he was to work at the same employer facility where he had been working before the injury.

In Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, we considered a factual situation where an injured employee had returned to work performing light duty and was subsequently terminated about six weeks later for cause. The hearing officer concluded that the employer's bona fide offer had been effectively withdrawn and that the employee had disability and was entitled to continued TIBS. We said in that case that we expected that most cases would be resolved on the specific factual setting involved and we did not there find the employer's reason for the employee's termination for cause "a ruse or without reasonable justification or that it was selectively applied to the respondent." Under the circumstances of that case, we felt that the employee's inability to obtain and retain employment, up to a certain date, was not because of her compensable injury but rather was because of misconduct unrelated to the injury. In so holding, we observed: "Whether the termination for cause was, effectively, a withdrawal of a bona fide offer of employment or was, effectively a rejection of the bona fide offer of employment is of no moment. We do not hold it was either. However, we do hold that the respondent's inability `to obtain and retain' employment on the date of her termination for cause was because of her misconduct and not because of a compensable injury." However, we went on to state that "[i]f and when an injured employee, who is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from obtaining and retaining new employment at preinjury wage levels, [TIBS] once again become payable."

We are satisfied the evidence sufficiently supports the hearing officer's findings and conclusions. Articles 8308-6.34(e) and (g) provide that the hearing officer, as the fact finder, is the sole judge not only of the materiality and relevance of the evidence, but also of its weight and credibility. We will not substitute our judgement for that of a hearing officer where challenged findings are supported by sufficient evidence.

The evidence requires the reformation of Finding of Fact No. 5 that the position which claimant was offered on January 13th would have paid him 85% of his preinjury wage. The

January 12th letter offering claimant the terminal assistant job stated: "The pay for this job, plus your worker's comp benefits, equals 85% of your regular wages in a 40-hour workweek. You'll receive separate checks, one for benefits (tax-free) and one for the transitional job (taxable). (Emphasis supplied.)" It appears from the language in Finding of Fact No. 5 and in the Decision and Order recited above that the hearing officer understood that the terminal assistant job wages alone would constitute 85% of claimant's preinjury wages. Accordingly, Finding of Fact No. 5 is reformed to read:

"The position which [employer] offered Claimant on January 13, 1993, would have paid Claimant eighty-five percent of his preinjury wage less the amount of his [TIBS].

The Decision and Order is reformed as follows:

Although Claimant continues to have disability, Claimant's former employer extended him a bona fide offer of employment for eighty-five percent of his preinjury wage on January 13, 1993, less the amount of his [TIBS]. Carrier is ORDERED to reduce Claimant's [TIBS] to the greater of the minimum weekly [TIBS] or seventy percent of the difference between Claimant's preinjury average weekly wage and the wage offered by employer on January 13, 1993.

Claimant testified he had been earning $16.73 per hour for a work week consisting of "42, maybe 44 hours." According to the BRC report, claimant's TIBS were $456.00 per week.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge